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Supreme Court of the United States

OCTOBER TERM—1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON
LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

BRIEF OF APPELLANT

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Supreme Court of the United States

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MRS. J. H. POBRESLO,

Plaintiff and Appellant,

against

JOSEPH M. BOYD COMPANY,

Defendant,

No. 171

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY, and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

BRIEF OF APPELLANT

This is an appeal by Mrs. J. H. Pobreslo from a judgment of the Supreme Court of the State of Wisconsin entered on the 10th day of May, 1932, based upon an opinion of that Court rendered and filed on the same day reversing the judgment of the trial court.

General Statement of Federal Question Involved.

The case involves the question whether, during the existence of the National Bankruptcy Act, a general assignment for the benefit of creditors under Chapter 128, Wisconsin Statutes, was effective to withdraw the property of the assignor from the reach of a garnishment in an action against the assignor by appellant, a non-assenting creditor who was unable to invoke the Bankruptcy Act. The trial court sustained appellant's contention that the state statute was suspended, the assignment void, and the property in the hands of assignees subject to the garnishment. The Supreme Court, reversing the trial court, held the contrary, its opinion being reported in 242 N. W. 725.

It is appellant's claim that the state statute is wholly suspended by the Bankruptcy Act because it sets up a complete statutory system of administering and distributing insolvent estates, enforcement of which would be destructive of the uniformity which is the primary object of the federal bankruptcy legislation. If the entire statute is not suspended, at least Chapter 334, Laws of 1897, relied upon by the State Court to defeat appellant's claim, is suspended, since it embodies all the elements of an involuntary bankruptcy law.

Grounds of the Federal Jurisdiction.

This question was fully discussed in Appellant's Brief on Jurisdiction heretofore submitted, and will not be repeated here.

The Facts.

The Joseph M. Boyd Company, an insolvent Wisconsin corporation, made a statutory assignment for creditors, but failed to comply with mandatory requirements of the statute.

The corporation was engaged in the business of selling securities and loaning money to the public (R. 4). On March 23, 1931, being then insolvent (R. 4), it assigned all of its property for the benefit of creditors under (but not in substantial compliance with) the provisions of Chapter 128, Wisconsin Statutes (R. 5). The assignees on the same day took possession of all of the property of the Company, before furnishing any bond whatsoever (R. 5). At no time have they furnished a bond in a sum equal to the then assets of the Company, as required by the statute (R. 5). Subsequently they filed a bond in an amount far below the value of the assets of the Company (R. 5). The assignees were expressly authorized by the assignment to incur expenses to operate the business if in their judgment further operation was desirable (R. 16). The assignment conveyed the property to the assignees:

> ". . . to the end that the debts and demands of the corporation may be paid and discharged." (R. 16).

The Circuit Court for Dane County assumed jurisdiction under the statute to distribute the estate among all creditors.

At the same time the assignment was executed a petition was filed in the Circuit Court for Dane County, requesting the court to assume full jurisdiction and supervision over the assignment and the distribution to be made thereunder. On the same day the court, by its order, assumed jurisdiction under the provisions of Chapter 128 (R. 14), and ordered the publication of notices to creditors in accordance with Section 128.14, Wisconsin Statutes, and the filing of proof of claims in accordance with the provisions of Section 128.15, Wiscon-

sin Statutes (R. 14, 15). The garnishee affidavit in the present action asserts, and it is admitted:

> ". . . that the said insolvent estate is now being administered and its assets are being distributed by the said trustees under the direction of the court in accordance with the provisions of said Chapter 128, Wisconsin Statutes of 1929, and will continue to be so distributed." (R. 7)

Distribution under the Wisconsin statute is less favorable to general creditors than under the Bankruptcy Act.

The garnishee affidavit alleges, and it is admitted:

> "That the said differences between Chapter 128, Wisconsin Statutes, 1929, and the Bankruptcy Act are such as to cause a distribution under the said Chapter 128, Wisconsin Statutes, 1929, which is less favorable to general creditors, of plaintiff's standing, than the distribution provided for by the Federal Bankruptcy Act." (R. 7)

These differences and conflicts between the two laws are set forth in detail in a subsequent portion of this brief. (p. 42.)

The question arises before this court exactly as it was presented in International Shoe Co. vs. Pinkus, 278 U. S. 261.

At the time the Boyd Company made its assignment, appellant had a cause of action against it on contract. On July 30, 1931, just a little more than four months after the assignment had been executed she commenced an action on this contract against the assignor Company. At the same time she commenced a separate garnishment action against the three assignees named in the assignment, on the theory that the assignment was void. Appellant asserted, and she now asserts, that if the assignment be regarded as a common law assignment it was void on its face because of certain presumptively fraudulent provisions contained there-

in, and if regarded as a statutory assignment, which, in fact, it was, then the proceedings in connection with the assignment had no validity because the statute in question was wholly suspended during the existence of the National Bankruptcy Act.

It was appellant's claim that she was authorized to garnish under the express provisions of Section 267.17, Wisconsin Statutes, which makes a garnishee liable for any property or credits held by conveyances void as to creditors.

Judgment was entered in appellant's favor on her claim against the Boyd Company, and thereafter judgment was entered directing the assignees to pay the appellant's judgment out of the assets in their hands.

The garnishee affidavit alleges, and it is admitted, that the Boyd Company was subject to the Bankruptcy Act, but that the appellant, being a single creditor, was unable to invoke that act, although a diligent effort was made to that end (R. 8). It is also admitted that the appellant has not filed a claim in the state assignment proceedings, and in that proceedings:

> "Preference will be given to creditors who have filed claims therein and plaintiff will be debarred a dividend." (R. 8)

Appellant claims, therefore, that being a single, non-assenting creditor like the plaintiff in the *Pinkus* case, she can take advantage of the invalidity resulting from the conflict between the state law and the National Bankruptcy Act, even though bankruptcy proceedings were not in fact instituted.

Subsequent to the commencement of this action the Boyd Company attempted to amend the assignment to provide for distribution in accordance with the terms of the Bankruptcy Act.

The garnishee defendants did not answer within the twenty day period required by law, the time for answering having been extended with the appellant's consent. In the interval

between the service of the garnishee summons and service of the answer, it appears to have been thought necessary, or at least advisable, to amend the assignment in order to meet the criticism that distribution under the state law conflicted with distribution under the federal law. The terms of the amendment are set forth in pages 19 to 23 of the Record and indicate an attempt to incorporate parts of the Bankruptcy Act into this assignment. While the Supreme Court of Wisconsin appears to have properly denied any effect to the amendment, it at least discloses an attempt to provide for a distribution in the state court in accordance with the terms of the National Bankruptcy Act (R. 21).

The attempted assignment gave the assignees further authority to conduct and continue the business (R. 22), and to postpone the sale and collection of the property for such time as was consistent with reducing the same to money until the same could be wisely done (R. 22). The attempted amendment limits the liability of the trustees to cases of loss resulting through their own wilful default (R. 23).

The Wisconsin Statutes on Voluntary Assignments (Chapter 128 Statutes) Underwent Three Stages of Development. Until 1889 the Chapter was Largely Regulatory of Voluntary Assignments. In 1889 Complete Provisions for Discharge Were Added. In 1897 a Complete Scheme of Involuntary Proceedings was Added to the Law.

Early statutory provisions were merely regulatory of common law assignments.

The statutory provisions material upon this appeal are found in Chapter 128, Wisconsin Statutes of 1929, which was in force when the assignment was made.

Since 1878 and up until 1889 the statutes were largely regulatory of common law assignments. The sections of the statute which come under this classification are Sections

128.01 to 128.06, a part of 128.06, and Sections 128.11 to 128.18 inclusive.

Section 128.01 provides that the Circuit Judge shall have supervision of the proceedings in voluntary assignments. This section has been in the statutes at least since 1878.

Section 128.02 provides that levies on executions, sales, mortgages and liens made or given within sixty days prior to an assignment shall be void under certain conditions and also invalidates preferences given within six months. This section dates back to 1883.

Section 128.03 deals with the powers of the assignee and authorizes him to proceed to set aside preferences, and upon his failure to do so gives this right to creditors, under certain conditions. This section dates back to 1882.

Section 128.04 provides that the assignee in an action to set aside fraudulent conveyances shall stand in the shoes of creditors. This section dates back to 1901.

Section 128.05 provides for the conditions under which a creditor may bring an action to set aside a fraudulent conveyance if the assignee fails to do so. This section dates back to 1901.

Section 128.06, except the last fifteen lines thereof, has been in the statutes since 1878. It provides that all voluntary assignments shall be void as to creditors unless the assignee, before taking possession of the property, shall give a bond in the amount and in the manner provided by this section.

Sections 128.11 to 128.18 have been in the statutes at least since 1878. Section 128.11 specifies the place where the bond shall be filed and authorizes the court to require assignees to furnish new or additional bonds.

Section 128.12 indicates the manner in which the assignee shall indicate his assent to the assignment.

Section 128.13 requires the assignor to make and file with the clerk of the court an inventory of his assets.

Section 128.14 requires the assignee, within twenty-two days after the assignment, to give notice to creditors and requires the creditors to file their claims within three months on pain of being debarred a dividend.

Section 128.15 provides for the manner in which objections to claims shall be heard and disposed of by the court.

Section 128.16 provides that creditors who do not file claims within the time limited shall not participate in any dividend paid before the claim is filed. Interest is computable to the time of the dividend. Before paying any dividend the assignee shall pay all taxes assessed upon the property and shall pay the compensation due all laborers, servants and employes for labor or services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment, and the execution of the trust.

Section 128.17 provides for the manner in which the assignee shall settle his accounts and for their approval or disapproval by the court.

Section 128.18 authorizes the Circuit Judge to remove an assignee upon the application of a majority of the creditors and to appoint a new assignee.

Discharge provision enacted in 1889.

Sections 128.19 to 128.29 inclusive came into the statutes in 1889 by Chapter 385 of the Laws of 1889, and provide a complete procedure whereby an assignor who has made a voluntary assignment and who complies with the statute may procure his discharge. These sections relating to discharge

originally constituted Chapter 80 (a) of the Statutes, and by revision of 1898 were embodied in the same chapter as that containing the foregoing sections dealing with assignments, which was then Chapter 80; and they have been held separable by reason of their independent origin (see page 14 below).

Chapter 334, Laws of 1897, which is relied upon to defeat plaintiff's claim, contains all the elements of an involuntary bankruptcy law, including discharge.

The last fifteen lines of Section 128.06, together with Sections 128.07 to 128.10, inclusive, came into the statutes by an amendment enacted in 1897 and known as Chapter 334, Laws of 1897, which chapter was entitled, "An Act to Amend Chapter 80 of the Revised Statutes of the State of Wisconsin for the Year 1878 entitled, 'Of Voluntary Assignments.'" Former Chapter 80 has now been renumbered Chapter 128. This Act is set forth in full as Appendix A, in appellant's brief on jurisdiction.

An analysis of the provisions of Chapter 334, Laws of 1897, discloses that in itself it contains every element of a bankruptcy law. It penalizes a debtor who, like the Boyd Company, makes an assignment not in accordance with the state law, or who does other acts which are the equivalent of acts of bankruptcy, by providing that the doing of such acts shall operate to give the state court jurisdiction to distribute the entire assets of the insolvent debtor in accordance with the statutory method of distribution, in entire disregard of the wishes of the assignor. Validity of preferences and of claims is determined in the state court. There is an express provision in the chapter for the discharge of the debtor. The chapter commences as follows:

> "But no assignment shall be void because of any defect, informality, or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the

assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; **but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided."** (Now part of section 128.06.)

Section 128.07 provides that when the property of an insolvent debtor is attached or levied upon, he may within ten days thereafter make an assignment, whereupon the attachment shall be dissolved and the property turned over to the assignee.

Section 128.08 provides that if an insolvent debtor shall confess judgment or give any creditor a preference or omit to do any act necessary to prevent creditors from obtaining a preference, or shall fail within ten days after a levy or attachment to make a voluntary assignment, then **any two or more creditors holding claims of not less than $200 may petition the court, and if it shall appear that the debtor is insolvent and has given a preference, or has refused to make an assignment, the court shall appoint a receiver who shall take possession of all of the debtor's property and distribute it pro-rata among his creditors.**

The section further provides that in such event creditors shall file and prove their claims; that the debtor shall file an

inventory, as provided in Section 128.13, and concludes as follows:

"The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a **discharge** from his indebtedness as if said debtor had made a voluntary assignment under this chapter."

Section 128.09 defines insolvency.

Section 128.10 authorizes provisional remedies in all actions brought under this Chapter, and authorizes the court to make orders for payment of costs and expenses.

Because the Supreme Court of Wisconsin, in the decision from which this appeal is taken, makes reference to Chapter 334, Laws of 1897, we reiterate that the last five sections of the statute hereinabove referred to (last fifteen lines of Section 128.06—128.10) constitute what is known as Chapter 334, Laws of 1897.

The state legislature in 1921 and in 1923 dealt with the entire Chapter 128 as a unit and considered it suspended by the Bankruptcy Act.

The only other legislative changes were the following:

By Section 35, Chapter 590 of the Laws of 1921, we find that Chapter 80 of the Statutes of 1919 (which then embodied all of the sections hereinabove referred to) was:

> ". . . withdrawn from the statutes and shall not be hereafter printed in the statutes so long as the National Bankruptcy Act remains in force."

This provision was a part of the Revisor's Bill prepared under the direction of Revisor Charles H. Crownhart, later a justice of the Wisconsin Supreme Court; and the bill, when adopted by the legislature, contained a note by the Revisor to the effect that:

> "Chapter 80 is the Voluntary Assignment Act and is suspended by the Federal Bankruptcy Act."

Two years later Chapter 132 of the Laws of 1923 provided that Chapter 80 should be restored as a part of the statutes and should be thereafter printed as such.

It is our information, derived from the Legislative Reference Library, that the Library prepared this Act at the request of Assemblyman Timmerman, who desired that it be printed in the statutes in order that certain provisions in the chapter in respect to priorities of claims due the state might be availed of in bankruptcy proceedings under the theory that the bankruptcy court would recognize state provisions in respect to exemptions and priorities. It is significant that the state legislature **did not treat any portions of the statute as severable,** but treated it as a unit.

The Wisconsin Decisions Prior to This Case Construed Chapter 128 as Containing all the Essential Features of a Bankruptcy Law.

Proceedings thereunder are entirely statutory and the assignment is void if the statute is not complied with.

The following decisions of the Supreme Court of Wisconsin, which are not intended to be all-inclusive, indicate the general construction which that court has placed upon the provisions of Chapter 128:

In *Klauber* v. *Charlton,* 47 Wis. 564, 569, the court said:

> "Previous to the enactment of this statute, it was competent for a debtor to make an assignment of his property to any person of his choice for the benefit of his creditors, without requiring such assignee to give any security for the faithful performance of the trust reposed in him. * * *
>
> The statute above cited was passed for the purpose of compelling assignees to give security for the faithful performance of their duties as such, and thereby afford some assurance to the creditors that the property assigned would be faithfully administered for their benefit; and it

declared all assignments **absolutely void** which were not made to some resident of this state, and where the assignee did not give the bond required by such act."

In *Wadleigh* v. *Merkle,* 57 Wis. 517, 518, the court said that under this chapter:

". . . there can be no assignment which shall have any efficacy to withdraw the property of the assignor from the reach of its creditors unless the provisions of said sections are complied with on the part of the assignor and assignee; and until the assignee shall have given his bond and signified his assent to take upon himself the discharge of the trusts mentioned in the assignment, the assignment is void."

Distribution thereunder is statutory, not voluntary.

In *Duryea* v. *Muse,* 117 Wis. 399, the court, referring to the chapter on voluntary assignments, said:

"Such bankrupt features relate to the **distribution** of the estate of the insolvent debtor and his discharge from his debts."

In *re Voluntary Assignment of the Milwaukee Sheep & Wool Co.,* 186 Wis. 320, the court said:

"The entire procedure in an assignment is largely determined by the statute and in order to be a valid assignment the statutory requirements must be complied with."

The court said further:

"By way of reiteration, let it be said that the statutes on voluntary assignments are designed **for the benefit of general, unsecured creditors.** It was such object that the legislature had in mind when it enacted Sec. 1701 (now 128.17), above quoted."

The statutory plan of distribution and discharge embodies the primary characteristics of a bankruptcy law.

In *Holton* v. *Burton*, 78 Wis. 321, the court, after pointing out the various amendments which had been made to Chapter 80 of the Statutes of 1878, including the amendment in respect to discharge, said:

> "Ch. 80, R. S. 1878, as amended by the laws above cited, is now an insolvent law under which the insolvent debtor may be discharged from his debts, at least as to the creditors residing in this state."

The court pointed out that under the amendments referred to, preferences given within sixty days were void, that the assignee was given the powers of a creditor to set aside fraudulent conveyances, and that provision was made for discharge.

In *Binder* v. *McDonald*, 106 Wis. 332, and in *Segnitz* v. *Garden City Bank & Trust Co.*, 107 Wis. 171, the court pointed out that it was the addition of Chapter 80(a), dealing with discharges, which led the court to speak of our whole system relating to voluntary assignments as an insolvent law. In the *Segnitz* case the court said, however:

> "It was, in legal effect, tacking a bankrupt law to the assignment law; and inasmuch as the **distribution** of the estate depends, not upon the will of the assignor, but upon the positive requirement of the law-making power, we can see no escape from the conclusion that in so far it becomes **statutory,** and **not voluntary."**

The discharge provisions enacted in 1889 have been held suspended by the Bankruptcy Act.

In *In re Voluntary Assignment of Tarnowski*, 191 Wis. 279, the court held that Chapter 80 of the Revised Statutes of 1878, which dealt with voluntary assignments (see p. 6 above) was severable from Chapter 80 (a) which dealt with

discharges, and that only Chapter 80 (a) was suspended by the Bankruptcy Act.

Although the court points out:

> ". . . that the statutory provisions under which the estate was administered **up to the point of distribution** are mere regulations of voluntary assignments for the benefit of creditors;"

and in spite of the fact that Chapter 80 prescribed the manner of distribution among general creditors, yet because the discharge provisions were found in Chapter 80 (a), Chapter 80 was held not an insolvent or bankruptcy law.

In other words, the case holds that even though the state law fully covers the matter of **distribution** of the estate among general creditors, yet, if the discharge provision can be detached therefrom it is not a bankruptcy law and is not suspended by the National Bankruptcy Act.

In case of a void assignment the estate is administered wholly by the court under Chapter 334, Laws of 1897, regardless of the wishes of the insolvent or his creditors.

In *Mayfield Woolen Mills* v. *Goodrich & Martineau Co.*, 189 Wis. 406, an assignment was made by the Goodrich Company. It claimed to be solvent and there was no finding to the contrary. There was no contention made that the assignment was affected by the Bankruptcy Act.

The assignees filed no bond. It was held that as the law stood prior to the enactment of Chapter 334, Laws of 1897, such failure would have rendered the assignment void and left the property subject to garnishment. It was held, however, that Chapter 334, Laws of 1897, covered such a case by its provision to the effect that if an assignment was for any reason void it should be administered under the direction of the court by the assignee or by a receiver appointed by the court under the provisions of Chapter 334, Laws of 1897, and

that the only remedy that a creditor had was to come into the assignment proceedings in the state court.

The case in effect holds that the only remedy left to a creditor is to participate in a proceeding in the state court, which proceeding is one where the state court assumes jurisdiction over the assignment, and, regardless of the wishes of the assignor, proceeds to appoint an assignee or receiver who administers the entire estate of the insolvent for the benefit of general unsecured creditors.

The state court has said that a discharge provision is an absolute essential of a bankruptcy law.

In *Hazelwood* v. *Olinger Bldg. Dept. Stores*, 205 Wis. 85, the court took occasion by **dictum** to point out that since the provisions of the Wisconsin Statute enacted in 1889 relative to discharge had been held severable and suspended in the *Tarnowski* case (see p. 14 above), and since the discharge was the very essence of a bankruptcy law, a statute which did not provide for discharge could not be held to be suspended by the Bankruptcy Act.

Summary of Wisconsin decisions prior to this case.

It is apparent from the foregoing statutory provisions and the decisions of the state court that an assignment, to have any potency, must be made in accordance with the terms of the statute; that distribution under an assignment is wholly statutory and independent of the wishes of the insolvent; that the entire estate of the insolvent is administered for the benefit of general, unsecured creditors; that the whole procedure is similar to, although in some points conflicting with, the procedure in bankruptcy; and that the state statute has every element of a bankruptcy law, including the discharge provision, although this provision as enacted in 1889 has already been held to be suspended.

Furthermore, the statute obviously is more than a voluntary assignment law. It contains every element of an involuntary bankruptcy law in that it provides detailed machinery whereby the court assumes jurisdiction over the estate of an insolvent who makes a void assignment or refuses to make any assignment, or who gives or suffers a preference, and administers this estate for the benefit of his general creditors, wholly regardless of the will of the assignor.

The Decisions of the Wisconsin Courts in This Case.

The trial court held the assignment void whether considered as a common law assignment or as made under the statute, and held that all of Chapter 128 was suspended because in conflict with the National Bankruptcy Act.

The decision of the trial court is printed at page 25 of the Record. That court held, in effect, that if this assignment be considered as a common law assignment and independently of the National Bankruptcy Act, it was void because:

(1) It limited the liability of the trustees.

(2) It authorized the sale of assets upon credit.

(3) It authorized the continuing of business and the incurring of expenses and mortgaging of property (R. 32).

These provisions, in the opinion of the trial court, on their face tended to hinder and delay creditors and made the entire assignment void.

The trial court held further that Chapter 128, Wisconsin Statutes, is a bankruptcy law because the distribution thereunder is statutory and not voluntary, and because distribution, and not discharge, is the principal element of a bankruptcy law; that the existence of the Bankruptcy Act suspended the operation of Chapter 128; that the debtor's assignment was therefore void; and that accordingly the appellant was free to garnish.

The supreme court held this was not a common law assignment; that the assignment was made under Chapter 128; that since the discharge provisions enacted in 1889 are suspended, Chapter 128 is valid; that this assignment is void for non-compliance with Chapter 128; that being void as a voluntary assignment it will be administered by the court under the provisions of Chapter 334, Laws of 1897, which law also takes away the remedy of garnishment; and that Chapter 334, Laws of 1897, is valid in toto.

The decision of the Supreme Court of the State, reversing the judgment of the trial court, is reported in Vol. 242 N. W. 725, and is printed at page 37 of the Record. That Court held that the assignment was intended, not as a common law assignment, but as a statutory assignment for creditors generally. It did not disturb the trial court's finding that, as a common law assignment, the instrument was void. The Supreme Court agreed that under the provisions of the statute the assignment was void for non-compliance with the provisions relative to the bond and other provisions. It held, however, that since the assignment was void under the statute, Chapter 334, Laws of 1897, which provides that the court shall administer void assignments (see page 10 above), came into operation; that creditors were relegated to the provisions of that chapter for their remedy and could not garnish; and that the remedy so afforded is to participate in the state court proceedings held pursuant to said Chapter 334.

The court expressly ruled that Chapter 334, Laws of 1897, which sets up this involuntary proceeding in which the insolvent estate is wholly administered for creditors generally and which by its terms expressly provides for discharge, is **"a valid enactment."** It was held valid in its entirety, the discharge provision therein not having been held separable nor suspended. The court also expressly held that state assignment laws which contain every element of a bankruptcy law except discharge are not suspended by the Bankruptcy Act, or in other words that discharge is the *sine qua non* of a Bankruptcy Act.

Specification of Errors.

The State court erred in:

(3) Holding that a state statute, such as Chapter 128 Wisconsin Statutes, which provides for the distribution of the assets of an insolvent debtor among his creditors is not suspended by the Bankruptcy Act regardless of whether it contains a valid provision for discharge.

(2) Failing to hold that Chapter 334 Laws of 1897 of Wisconsin is not in effect an involuntary bankruptcy system with provision for discharge and is wholly suspended by the national bankruptcy act.

In determining the effect of the Bankruptcy Act upon the state law this court will determine the question of conflict for itself and is not bound by the state decisions.

There is here involved a Federal question, and as far as the plaintiff's rights are secured under the Federal Statutes and the Constitution, the decision of the state court as to the validity of the state statute is not binding on this court. In determining whether the state law sets up a bankruptcy system, this court will look beyond the name or label that the state court affixes to the statute, and will consider independently the provisions of the legislation and determine for itself whether it is a bankruptcy law which invades the field occupied by the National Bankruptcy Act.

Clyde v. *Gilchrist*, 262 U. S. 94, 97.
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 114.
Choctaw & Gulf R. R. Co. v. *Harrison*, 235 U. S. 292.

"It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions

provisions of the statute the assignment was void for non-compliance with the provisions relative to the bond and other provisions. It held, however, that since the assignment was void under the statute, Chapter 334, Laws of 1897, which provides that the court shall administer void assignments (see page 10 above), came into operation; that creditors were relegated to the provisions of that chapter for their remedy and could not garnish; and that the remedy so afforded is to participate in the state court proceedings held pursuant to said Chapter 334.

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Assignment of Errors

The assignment of errors is set forth at page 1 of the Record and will not be repeated here.

I.

A STATE LAW WHICH SETS UP A COMPREHENSIVE SYSTEM OF ADMINISTERING AND DISTRIBUTING ESTATES OF INSOLVENTS AMONG GENERAL CREDITORS IS A BANKRUPTCY LAW AND IS SUSPENDED BY THE FEDERAL ACT EVEN THOUGH THE MATTER CANNOT PROCEED TO A DISCHARGE OF THE DEBTOR.

In determining the effect of the Bankruptcy Act upon the state law this court will determine the question of conflict for itself and is not bound by the state decisions.

There is here involved a Federal question, and as far as the plaintiff's rights are secured under the Federal Statutes and the Constitution, the decision of the state court as to the validity of the state statute is not binding on this court. In determining whether the state law sets up a bankruptcy system, this court will look beyond the name or label that the state court affixes to the statute, and will consider independently the provisions of the legislation and determine for itself whether it is a bankruptcy law which invades the field occupied by the National Bankruptcy Act.

> *Clyde* v. *Gilchrist*, 262 U. S. 94, 97.
> *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114.
> *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292.

> "It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions

of the national bankruptcy act in that regard, and the inquiry is not one which is governed by any rule of decision in the state. * * * but that question, when presented, will call for independent judgment, in the light of all the authorities."

In re Plotke, 104 Fed. 964, 968. (C. C. A. 7th Cir.)

The Wisconsin law should be analyzed and classified in the light of the fact that when it was enacted there was no Bankruptcy Act and hence no conflict. It was clearly a bankruptcy law then, and nothing has happened since to change its character.

In determining whether the Wisconsin Statutes set up a bankruptcy system, they should be viewed in the light of the surrounding circumstances at the time of their enactment, in order to determine the legislative intent. The entire Wisconsin statutory system was complete prior to 1898, the date of the present Bankruptcy Act.

When the Wisconsin Legislature enacted the chapter on discharge in 1889 (see p. 8 above), and subsequently added the involuntary proceedings with its additional discharge provision in 1897 (see p. 9 above), there was no National Bankruptcy Act. It should require no citation of authority for the assertion that the Wisconsin statutes, as they existed in 1897, comprised a complete state bankruptcy system. They had every feature of a bankruptcy law.

The legislature has made no material changes in the state law since 1897. If it was a bankruptcy law in 1897, why is it not a bankruptcy law today? The only answer of the state court is that certain of the discharge provisions in the law have since been judicially declared to be suspended. We submit that the suspension of those discharge provisions is not sufficient to change what was admittedly a bankruptcy law into one which does not relate to the "subject of bankruptcies."

The early history of bankruptcy legislation demonstrates that discharge is not a necessary part of a bankruptcy law.

We are not unmindful of the fact that bankruptcy has come to be commonly regarded as a measure designed to free debtors from their debts. This results, undoubtedly, from the fact that of late years it has been more commonly invoked by debtors than by creditors. But the use made of the law does not determine its fundamental nature or purpose, and these can best be determined by recurrence to the early history of bankruptcy legislation.

The history of such legislation is exhaustively reviewed by Remington in the introduction to his work on *Bankruptcy*, 3rd ed. His conclusions are stated thus:

> "To gain a proper conception of bankruptcy law and of its place in jurisprudence it is well first to exclude from the idea certain popular misconceptions of its origin, scope and function. The bankruptcy law is popularly conceived to be a law devised mainly for releasing debtors from the bondage of hopeless indebtedness. This is undoubtedly the first idea that springs to mind when bankruptcy law is mentioned. But it is a wholly inadequate idea. **Release from debts is not necessarily a part of the bankruptcy law at all, and from the standpoint of history is a mere incident to its original object.** * * * But this release from debts is, as above noted, merely an incident of the later development of bankruptcy law, not its original object." (p. 1)

The early Roman law impounded the debtor's property, provided for its equitable distribution among creditors, imposed penalties for fraud on the debtor's part, but contained no provision for discharge.

Radin, *Handbook of Roman Law*, p. 314.

Bankruptcy legislation in England bears out this view. The first English bankruptcy act contained no provision for discharge (34 Henry VIII, 1542); in fact it contained an ex-

press provision that there should be no discharge. Queen Anne's Act of 1705 contained the first provision for discharge, although discharge was wholly conditional upon the consent of a high proportion of the creditors. The state of the law on bankruptcy in England at the time of the Revolution is set forth in Blackstone's Commentaries, Book II, Chapter XXXI. A very minor portion of the chapter deals with discharge, and the discharge was conditional upon consent of four parts in five in number and value of the creditors.

The meaning of the constitutional grant of power given to Congress under Article I, Section 8, of the Constitution must be viewed in the light of English bankruptcy history.

> "We take our bankruptcy system from England and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of the law goes with the words where they are copied by another state."
>
> *Sexton* v. *Dreyfus,* 219 U. S. 339, at 344.

And so we find the prevalent ideas of the English system embodied in the first national bankruptcy law, which was passed in 1800 during the administration of John Adams. It was essentially a law against debtors. It could not be invoked by the debtor. It applied only to traders, merchants and brokers. It gave no absolute right to discharge. Discharge could not be had without the written consent of two-thirds in number and value of all creditors. 2 U. S. Stat. at L. 19.

If this law had, like the early English acts, contained no provision for discharge, could it be said that it was not a bankruptcy law and was not within the grant of power to Congress? In response to this question Chief Justice Marshall said:

> "* * * But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions

liable to his creditors, we should feel much hesitation in saying this was an insolvent, and not a bankrupt act, and, therefore, unconstitutional."

Sturges v. *Crowninshield,* 4 Wheaton, 122, at 194.

The main purpose of a bankruptcy law is the equitable distribution of the insolvent estate among all creditors. If a state law accomplishes that purpose, it is suspended by the Bankruptcy Act.

The meaning of the term "the subject of bankruptcies" as contained in the Constitution, does not necessarily involve the element of discharge. In the case of *In re Klein,* 1 Howard 277, at 280, Mr. Justice Catron, speaking for the Court, said:

"In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word 'bankruptcy'. It is employed in the Constitution in the plural, and as part of an expression: 'the subject of bankruptcies.' The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction restricted?

"**I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit.** Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

"With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.

> "I have spoken of State bankrupt laws. **I deem every State law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors;** and it is especially such if it causes the debtor to be discharged from his contracts within the limits prescribed by the case of *Ogden* v. *Saunders*. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law, in the sense of the Constitution; and if Congress should pass a similar law, it would suspend the State law, while the act of Congress continued in force."

See also *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186.

Remington, in Section 2110 of his work on *Bankruptcy*, says:

> "In order for a system to amount to a bankruptcy system it must provide machinery for throwing a debtor into insolvency involuntarily and for completely administering his assets, and that if the system does so operate then it is a bankruptcy system . . ."

Louis E. Levinthal in an article, "Early History of Bankruptcy Law," 66 Pa. Law Review, 223, says:

> "In other words, bankruptcy law seeks to protect the creditors first from one another and secondly from their debtor. A third object, the protection of the honest debtor from his creditors by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."

James Monroe Olmstead, in an article, "Bankruptcy, A Commercial Regulation," 15 Harvard Law Review, page 829, traces the early history of bankruptcy legislation and its purposes and concludes that:

> "Its main objects are administration and distribution, rather than relief of the debtor."

Judge Ray, who was a member of the Judiciary Committee of the House of Representatives that passed the Bankruptcy Act of 1898, and was Chairman of the Judiciary Committee that secured the passage of the 1903 amendment, and later became District Judge for the Northern District of New York, and who must have known the legislative intent, said in an opinion in *In re Leslie,* (D. C., N. Y.) 119 Fed. 406, at 410:

> "The main purpose of the Bankrupt Law is to prevent preferences, and secure a fair and equitable division of the bankrupt estate among the creditors, **not to grant discharges."**

That the matter of **distribution** of insolvent estates is within the "subject of bankruptcies" has been recognized by the Supreme Court of Wisconsin. In *Pope* v. *Title Guaranty & Surety Co.,* 152 Wis. 611, at 614, the court said:

> "It has been held, correctly we think, that the 'subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends.' "
>
> *Leidigh Carriage Co.* v. *Stengel,* 95 Fed. 637, at 647 (C. C. A., Ohio).
> *In re Bininger,* Fed. Cas. 1420 (C. C., N. Y.).
> *In re Barrett & Co.,* 27 Fed. (2d) 159, at 161 (D. C., Ga.).

This court has held that distribution is the element primarily characterizing a statute as a bankruptcy law.

It is our contention that the foregoing review of early bankruptcy legislation demonstrates that while the discharge provision is commonly found in the bankruptcy law, it is in no sense an essential feature thereof, and that a state statute which provides for the general distribution of an insolvent's

estate contains the prime essential of a bankruptcy law and is a bankruptcy law. We believe this position is sustained by *International Shoe Co.* v. *Pinkus*, 278 U. S. 261.

International Shoe Co. v. Pinkus, 278 U. S. 261, considered.

In that case the debtor commenced a suit in the Arkansas court, praying to be adjudged insolvent and for the appointment of a receiver to take and distribute his property as directed by the state statute. The court appointed a receiver with directions to take the property, liquidate it, and notify creditors to make proof of claims with the necessary stipulation that they would participate in the proceedings in full satisfaction of their demands. The state law did not purport to grant a discharge to the debtor, but it did give preference to creditors who in filing their claims agreed in effect that as to their claims the debtor would be discharged. As far as the state law was concerned, creditors could file and participate without this stipulation, but such creditors were subordinated to the preferences mentioned. The plaintiff in the *Pinkus* case, a single creditor, could not invoke bankruptcy proceedings, and accordingly brought suit against the receiver on the theory that the property in the latter's hands was subject to the plaintiff's claim. It was held that the Arkansas law was suspended by the Bankruptcy Act and that plaintiff was entitled to have its claim paid in full by the receiver. Referring to the Arkansas law this court said:

> "It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the court. It classifies creditors, prescribes the order of payment of their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution." (p. 264)

The court said further:

> "The state enactment operates within the field occupied by the Bankruptcy Act. The insolvency of Pinkus was covered by its provisions. He could have filed a voluntary petition. His application to the state court for the appointment of a receiver was an act of bankruptcy; * * * and, at any time within four months thereafter, three or more creditors having claims amounting to $500 or over could have filed an involuntary petition." (p. 264)

The court further said:

> "The general rule is that an intention wholly to exclude state action will not be implied unless, when fairly interpreted, an Act of Congress is plainly in conflict with state regulation of the same subject. *Savage* v. *Jones, supra. Illinois Central R. R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510. *Merchants Exchange* v. *Missouri*, 248 U. S. 365. In respect of bankruptcies the intention of Congress is plain. **The national purpose to establish uniformity necessarily excludes state regulation.** It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, 618. *Northern Pacific Ry.* v. *Washington*, 222 U. S. 370, 378, *et seq. St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U. S. 265, *Erie R. R. Co.* v. *New York*, 233 U. S. 671, 681, *et seq. New York Central R. R. Co.* v. *Winfield, supra. Erie R. R. Co.* v. *Winfield, supra. Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 101. It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and

> providing for their discharge, **or that otherwise relate to the subject of bankruptcies,** are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded." (pp. 265-266)

Dealing with the contention that state laws of this character are suspended only if bankruptcy in fact intervenes, this Court pointed out that the plaintiff in error could not invoke jurisdiction of the bankruptcy court and concluded as follows:

> "The enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcies throughout the United States.
>
> "As all the proceedings were had under the Arkansas insolvency law, we need not decide whether, independently of statute, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least **insofar as it relates to the distribution of property** and releases to be given, plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver." (p. 268)

It seems apparent from the foregoing that when the court condemned state laws "that otherwise relate to the subject of bankruptcies" it was intended to declare laws suspended which, like the Wisconsin law, provide for a complete statutory distribution.

While discussing the *Pinkus* case we point out further that Mrs. Pobreslo, the plaintiff in the present case, like the plaintiff in the *Pinkus* case, was a single creditor who was unable to invoke the jurisdiction of the Bankruptcy Court. She filed no claim in the state proceedings, and under the rule of the *Pinkus* case it was not necessary that bankruptcy proceedings be in fact instituted in order to suspend the state law.

Straton v. New, 283 U. S. 318, considered.

This Court again dealt with the question in the case of *Straton* v. *New,* 283 U. S. 318. In that case judgment creditors of a corporation had commenced creditors' suits to marshal and enforce the liens and sell the real estate. **Claims of general creditors were in no way involved.** The suits had been commenced more than four months prior to bankruptcy. The question was whether bankruptcy ousted the state court of jurisdiction in the creditors' suits. This Court pointed out that:

> "The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal **distribution** among the creditors." (p. 320)

It should be noted that nothing was said about discharge being an essential element of a bankruptcy law.

The Court proceeded to analyze the nature of the receivership proceedings in the state court there involved, and said:

> "This statute says nothing about a **distribution** of assets amongst general creditors. It contains no provision that lien claims presented which cannot be paid because the proceeds of the sale are insufficient shall be wiped out as debts of the defendant. It does not purport to discharge the debtor from his indebtedness generally. * * * The act is in no sense an insolvency statute, and a proceeding thereunder is not, therefore, avoided by the adjudication of the debtor as a bankrupt." (p. 329)
>
> *Straton* v. *New,* 283 U. S. 318.

This language indicates quite clearly that if this were a general winding up proceeding under the state statute, with provision for a distribution of assets among general creditors, it would be a bankruptcy proceeding.

In the same case, referring to the decision in *In re Watts*, 190 U. S. 1, and to the rule there stated, the Court said:

> "This was merely a statement of the well settled principle that **a general winding up receivership is tantamount to an insolvency proceeding** which will be superseded by bankruptcy, and, a fortiori, if, as in that case, the petition is filed within four months of the appointment of the receiver."

This language makes clear that **general winding up receiverships** or proceedings under state statutes providing for the distribution of assets among general creditors **are insolvency proceedings** which are suspended during the existence of the National Bankruptcy Act, regardless of the absence of discharge provisions.

The lower federal courts have held that discharge is not an essential element of a bankruptcy law.

In *Straton* v. *New*, 283 U. S. 318, at 330, this Court cited with approval the following cases construing state laws as being in conflict with the bankruptcy law, and therefore suspended:

In re Weedman Stave Co., 199 Fed. 948 (D. C., Ark.).
In re Smith, 92 Fed. 135 (D. C., Ind).
In re Salmon, 143 Fed. 395 (D. C., Mo.).
In re F. A. Hall Co., 121 Fed. 992 (D. C., Conn.).
In re Storck Lumber Co., 114 Fed. 360 (D. C. Md.).

All of these cases involved state laws which contained no discharge provision but which provided for statutory distribution. The Supreme Court of Wisconsin disposed of them on the theory that they merely held that proceedings under a voluntary assignment in the state court were superseded

if bankruptcy actually intervened within four months. Without reviewing the facts of the cases in detail we assert without hesitation that they hold that state insolvency laws containing no discharge provision are *ipso facto* suspended during the existence of the Bankruptcy Act, regardless of whether bankruptcy proceedings are invoked in the particular case.

In *In re Weedman Stave Co.*, 199 Fed. 948, 950 (D. C., Ark.), the Court pointed out at the very outset that the receiver under the statute had been appointed more than four months prior to the institution of bankruptcy proceedings. In the same case the Court said:

> "The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors and a provision for priorities or other matters not permissible in the absence of such a statute. A provision for the **discharge** of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law. *In re Curtis* (D. C.), 91 Fed. 737; *In re F. A. Hall Co.* (D. C.), 121 Fed. 992; *In re Salmon* (D. C.), 143 Fed. 395; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147."

In the case of *In re Smith*, 92 Fed. 135, 137 (D. C., Ind.), the Court was dealing with a state statute containing no provision for discharge, and held that it could not stand side by side with the federal act, without any reference to the question whether bankruptcy proceedings had actually been invoked. The opinion of Judge Baker in this case so ably states the considerations which we deem controlling that we quote it at some length:

> "The statute of this state (2 Burns' Rev. St. 1894, Secs. 2899-2920, inclusive; Rev. St. 1881, Secs. 2662-2683, inclusive) provides that any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property in trust for

the benefit of all his or their bona fide creditors, and all assignments hereafter made by such person or persons for such purpose, except as provided by the statute, should be deemed fraudulent and void. The debtor or debtors making a general assignment are authorized to select his or their trustee, who shall qualify and serve, unless the creditors representing in amount one-half of the liabilities petition the court for his removal and the appointment of another trustee. The administration of the debtor's estate so assigned is placed under the control and jurisdiction of the proper circuit court of the state. The statute provides for the conversion of the assets into money, the collection of debts due the insolvent, the proof of claims by creditors, the distribution of the proceeds arising from the property assigned among the creditors according to their respective priorities, and for the final settlement of the trust estate and the discharge of the trustee. **There is no provision for the discharge of the insolvent debtor.** This statute constitutes an insolvency law, and regulates the making of an assignment, which must embrace all the property of the debtor, as well as every step to be taken in winding up the estate of the bankrupt, to the distribution of its proceeds among those entitled to share therein, all to be administered in a state court possessed of general jurisdiction at law and in equity. It embraces the same persons and subject-matter as the bankruptcy act, and, if the state law still remains in force, every insolvent's estate may be administered in a state court, and must be so administered, if it first acquires jurisdiction, because, if the state statute continues in force, there would be two courts (state and national) possessing concurrent jurisdiction over the same person and the same subject-matter, and whichever of the two first acquired jurisdiction would retain it, and administer the estate of the insolvent, to the exclusion of the other. The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency, if the state court, proceeding under our state insolvent law, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final distribution among those entitled to participate therein, leaving to this court nothing but the adjudication of bankruptcy

and the discharge of the bankrupt. Such a construction is inadmissible, because it would render inoperative numerous express provisions of the bankruptcy act. The state statute and the bankruptcy act cannot stand together. The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, insofar as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; to have acts of bankruptcy affecting the settlement of estates determined by it (section 3); to have the rights of debtors to file voluntary petitions and of creditors to file involuntary petitions, determined by it (section 4); and to have liens and preferences governed by it (sections 60, 67). These and various other provisions of the bankrupt act affecting the conduct and rights of debtors and creditors are different from those found in the statute of this state touching general assignments. In my opinion, the operation of the state law is suspended, and the state courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents."

In re Salmon, 143 Fed. 395, 405 (D. C., Mo.), squarely held that the state law, without a provision for discharge, was suspended by the passage of the National Bankruptcy Act. The Court said:

> "Again, to render a state insolvency law inoperative because in contravention of the federal bankrupt act, **it is not essential that the state act shall contain a provision for the discharge of the debtor.** It is rather thought such provision for discharge is an incident to, but not an essential part of, such law". (citing cases.)

To the same effect are the holdings in the case of *In re F. A. Hall Co.,* 121 Fed. 992 (D. C., Conn.), and *In re Storck Lumber Co.,* 114 Fed. 360 (D. C., Md.).

In the case of *Hammond* v. *Lyon Realty Co.*, 59 Fed. (2d) 592, 594 (C. C. A. 4th Cir.), the Court said:

> "The Court of Appeals of Maryland, in *Hughes* v. *Hall*, 118 Md. 673, 677, 85 A. 946, seemed to regard the Maryland statute as an insolvency law; but it is argued that this view must not be accepted literally because the Supreme Court in *Stellwagen* v. *Clum* and *International Shoe Company* v. *Pinkus, supra*, has emphasized the importance of the discharge of the insolvent from his debts in any system of bankruptcy law. It was not decided in either of these cases that there might not be a state insolvent law that would be superseded by the National Bankruptcy Act, although not providing for the discharge of indebtedness. See *Stellwagen* v. *Clum*, 245 U. S. 616, 38 S. Ct. 215, 62 L. Ed. 507. Nor was it decided or suggested that the provisions of a state law looking toward the settlement of the affairs of an insolvent corporation must be given effect unless the law comprises all of the essential elements of a general insolvency statute."

In the case of *In re Reynolds*, Fed. Cas. No. 11, 723 (C. C., R. I.), the Court said:

> "Our state insolvent law authorizes, upon the application of the debtor, proceedings for the distribution of his property only, and the discharge of his person from imprisonment. **It does not release the debt.** The bankrupt law of 1867 does all this upon such application, and also releases the debt. Assuming the constitutionality of the bankrupt law in other respects, which has neither been discussed or denied before us, we must hold that, under the decisions and concurring practice to which we have referred, these provisions of the bankrupt law authorizing a debtor to apply for and obtain a discharge of his debts, and providing for a distribution of all his property among all his creditors, are within the legislative power of congress under this grant in the constitution; the system, differing in this department only from our insolvent law in extending the release, but not at all in the provisions for taking possession, through officers appointed by the court, of the entire property of the in-

solvent, and distributing it among all his creditors, covers all the provisions of our insolvent law. It legislates for all of them, and for more in its voluntary department, and adds thereto the involuntary department of the law enabling creditors to move for all these processes against the debtor in their own behalf. We must, therefore, find that congress has, within its constitutional powers, legislated upon the entire subject of our insolvent laws. And such legislation, it has long been settled, when exercised, suspends the state legislation upon the same subject. We must, therefore, grant the motion."

In *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483 (C. C. A. 5th), the court dealt with the Georgia statute in which the only provision for discharge was that the chancellor might **recommend** discharge to the creditors. This entire law was held suspended by the Bankruptcy Act.

That discharge is not the essential characteristic of a bankruptcy law is emphasized in the case of a corporation, as to which the discharge is a negligible feature.

In the case *In re Merchants' Ins. Co.*, Fed. Cas. No. 9,441 (D. C., Ill.), the court said:

"We might further answer this objection by the suggestion that a discharge of an insurance company's liabilities under this state statute and proceedings in the state courts would be, in the nature of things, superfluous and unnecessary, for the reason that the main object of the proceeding is to forfeit the charter and franchises of the corporation, and why assume to discharge from further liability a debtor whose legal entity is to be dissolved? If its corporate existence is to be terminated it matters little what becomes of its unpaid balances.

"It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may

not authorize a discharge of the debtor from further liability on its debts."

In *Exploration Mercantile Co.* v. *Pacific Hdwe. & Steel Co., et al.*, 177 Fed. 825, 828 (C. C. A. 9th, Nev.), the Court said:

> "Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property, and the distribution of assets. **Although the act does not provide for the discharge of the debtor, and is not so entitled, it is essentially an insolvency act.** The winding up of the corporation discharges its debts. 'An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor.'"

In the case of *In re F. A. Hall*, 121 Fed. 992, 997 (D. C., Conn.), the Court said:

> "The main purpose of the law is the collection and distribution of the assets. The discharge is an incident to, but not a part of, the bankruptcy proceedings, as to such distribution. **In the case of a corporation there can be no discharge.** The corporation ends its existence, but its stockholders cannot be discharged and if there is no liability there is no need of a discharge; . . ."

Judge Cowie, who decided the present case in the trial court, thus characterized the proceedings:

> "Tested by the inevitable result of these assignment proceedings if permitted to proceed, the property of this corporation will be disposed of and distributed among such creditors as have filed their claims and the corporation be **discharged of its debts,** just as effectually as though an order of the court were made barring all creditors who have not so filed.
>
> "It is simply an ingenious way of going through bankruptcy under the guise of a common law assignment. There remains, after this trust is complied with,

no property of the Boyd Company and no personal liability on the part of its stockholders. The corporation is discharged of its debts and its creditors are barred of any remedy." (R. 28)

The trial court said further:

"So, with all due respect to eminent authority to the effect that the discharge feature of the national bankruptcy act is the very essence of the act, I am still of the opinion that the prime purpose of **that act in the first instance was to provide a uniform method for the just and equitable distribution of the assets** of the estates of bankrupts among creditors and to avoid confusion and conflict among the different states in the administration of such estates, and **that the discharge feature was secondary in the minds of Congress when the act was passed.** This, from the language of the *Pinkus* case, seems too plain and significant to admit of serious dispute.

"So I fail to see a substantial difference between the statutes of Arkansas and the provisions of Chapter 128 of this state, or this common law assignment; if we choose to so regard it. The difference is in words only. In either case, it is an invasion of the field of the national bankruptcy act and void in toto. The position of the garnishee defendants is a mere play upon words, a legal beating of the devil around the bush." (R. 30)

That discharge is not essential to bankruptcy is illustrated by the fact that the Bankruptcy Act expressly prohibits discharge to certain debtors.

The fallacy of the idea that there must be a provision for discharge in order to classify a statute as a bankruptcy law, is illustrated by the following situation. The federal Bankruptcy Act which was in effect in 1874 absolutely denied discharge to corporations under any circumstances. It was claimed that discharge was of the essence of a bankruptcy law, and that Congress could not make a bankruptcy law by

merely designating it as such if it did not include the feature of discharge. This contention is fully and ably refuted in the case of *In re California-Pacific Railroad Co.*, Fed. Cas. No. 2,315 (D. C., Calif.). The court said:

> "I can nowhere find it decided or maintained, that a law to be 'a law on the subject of bankruptcy' within the meaning of the constitution must provide for the discharge of all persons subject to its provisions.* * * The Bankruptcy Act, even if all provisions for the granting of discharges were stricken out, would still retain the most important features of a Bankruptcy Law."

The present Bankruptcy Act (Section 32) expressly provides that the discharge provisions are wholly inapplicable to any debtor who has been granted a discharge in a voluntary proceeding within six years. Could it be said that as to such a debtor the law is not a bankruptcy law? With respect to a debtor of that class, a proceeding under the Wisconsin statute would do everything from beginning to end that a court of bankruptcy would do, in a different manner, to be sure, but with like effect so far as the unpaid claims of creditors are concerned. As to such a debtor the state law would operate wholly in the field occupied by the Bankruptcy Act. In a case of that kind discharge would not be involved under either the federal or the state law. According to appellee's logic Congress, being limited to the "subject of bankruptcies," would have no power to legislate for distribution of assets without discharge of the debtor.

On the contrary we claim that in such a situation the case would be clearly within the jurisdiction of the bankruptcy court, even though there could be no discharge, and that a state law which purported to grant jurisdiction to the state court to do everything that could be done under the Bankruptcy Act would be invading the field covered by the national legislation.

A Congress that has power to attach conditions to discharge has power to deny it entirely, and a law providing

for denial of discharge would be no less a law dealing with the "subject of bankruptcies."

Congress by making an assignment an act of bankruptcy has clearly indicated its intention that assignments for creditors should be administered in the federal court.

In the case of *In re Curtis,* 91 Fed. 737, at 740, (D. C., Ill.), the court said:

> "The object of enumerating in the national bankrupt act what shall constitute an act of bankruptcy is for the very purpose of specifying with certainty what estates shall be administered in the bankrupt court. And, in declaring that whosoever should attempt to distribute his estate by a general assignment should be adjudged a bankrupt it is also the plain intent of the law that such person should not be permitted after the 1st day of July, 1898, to do so, but, instead, **such estate must be administered in the precise manner pointed out by the national bankrupt act.** From this it is obvious that not only the main objects of the state and federal laws are identical, but also that they both expressly provide a manner of administering the estate of whosoever shall make a general assignment. This being the case one must yield to the other. One must be operative and the other inoperative. Both cannot be in full force and effect at the same time. Which remains paramount and operative cannot be in doubt. That the state law shall be suspended is now well settled, and it is therefore the opinion of this court that the proceedings under the general assignment made by the Bank of Waverly, and in the Morgan county court, are wholly unauthorized and void. Public policy, as manifested by the bankrupt act, demands that all insolvent estates (of a certain value) shall be administered in the bankrupt court and in accordance with a uniform system."

In the case of *In re Gutwillig*, 90 Fed. 475, at 477 (D. C., N. Y.), the Court said:

> "Voluntary assignments of all a debtor's property in trust for creditors, are just as incompatible with the purposes of the bankrupt act as state insolvent systems, and for precisely the same reasons, viz. because if allowed to stand as against a trustee in bankruptcy they defeat the most essential elements of the bankrupt law; namely, the distribution of the debtor's assets in the manner prescribed by the bankrupt act, and through the agencies to which that act commits them. Creditors are vested by the act itself with a right to have the bankrupt's assets administered not only in accordance with the act, but through the instrumentalities and under the supervision which the act provides; and this right manifestly cannot be nullified at the mere option of the debtor."

II.

UNIFORMITY, THE FUNDAMENTAL AIM OF THE CONSTITUTIONAL GRANT OF POWER TO CONGRESS WITH RESPECT TO BANKRUPTCIES, WOULD BE WHOLLY DESTROYED BY THE ENFORCEMENT OF CONFLICTING SYSTEMS SUCH AS THAT SET UP BY THE WISCONSIN STATUTES.

Uniformity is destroyed even though the state systems copy as far as possible the provisions of the federal act.

Referring again to Article I, Section 8 of the Constitution, the grant of power to Congress "to establish uniform laws on the subject of bankruptcies" is contained in the same section granting power to Congress to establish a uniform rule on naturalization, and immediately follows the grant of power to regulate interstate commerce. Clearly the makers of the Constitution, and the Congress that exercised the power it confers, recognized the vast sweep of interstate com-

merce and meant to free interstate traders from the confusion and harassment attendant upon a multiplicity of variant local laws. James Madison, writing in *The Federalist*, said:

> "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds where the parties live or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn into question."

Congress has acted under the constitutional grant of power and has thereby entered the entire field of bankruptcy. Having done so, states are excluded from regulating the same subject. When the federal door is open, the state door is automatically shut.

> "The plain purpose of the Bankruptcy Act to establish uniformity necessarily excludes state regulation of the subject matter, whether interfering with the Act or complementary, additional or auxiliary."
>
> *International Shoe Co.* v. *Pinkus*, 278 U. S. 261.

Uniformity, as that term is used in the Constitution, does not, therefore, mean merely the absence of actual conflict between the provisions of state and federal laws on this subject. Uniformity is not achieved by the enactment of numerous state laws that copy, as nearly as may be, the provisions of the National Act. **Uniformity implies one national system exclusive in its field.**

> "For, if every state in the Union were to pass a bankrupt law in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to Congress."
>
> *Ogden* v. *Saunders*, 12 Wheaton 213, 275.

The Wisconsin system violates the requirement of uniformity in two respects: first, in that it sets up an additional sys-

tem operating upon the same persons and upon the same subject matter; and secondly, in that its provisions in fact are inconsistent and in conflict with the provisions of the National Act.

Uniformity is destroyed by the enforcement of the Wisconsin statute, which in fact contains serious conflicts and inconsistencies with the federal act.

Counsel for the appellees realized, after this proceeding was instituted, that the distribution provided by the state statute (Sec. 128.16) was in conflict with the Bankruptcy Act, and sought to meet this criticism by having the assignor amend the assignment to provide that distribution should be in accordance with the terms of the Bankruptcy Act. Now, obviously, if the first assignment was effective to transfer title to the property, the assignor could not subsequently modify its terms. Furthermore, the distribution being specifically prescribed under the state statute, the state court would not enforce any other method of distribution.

It is sufficient to say that the Wisconsin Supreme Court gave no effect to this attempted amendment, but it does stand as an open confession of the inconsistency between the two acts.

The state courts of Wisconsin have not thus far undertaken to administer the National Bankruptcy Act, and it is indicated pretty definitely in *Bromley* v. *Goodrich, et al.,* 40 Wis. 131, that they do not propose to do so.

If the only requirement for the survival of a state statute were that its provisions be similar to and not in conflict with the Bankruptcy Act, then a state law with a discharge provision should be sustained *a fortiori,* because that would be even more nearly identical with the federal law.

But if it be necessary to show conflict in fact between the state and federal systems of distribution, such conflict is apparent in the present case.

Distribution under the Wisconsin law is less favorable to general creditors than under the Bankruptcy Act.

The garnishee affidavit alleges and it is not denied:

> "That the differences between Chapter 128 Wisconsin Statutes, 1929, and the Bankruptcy Act are such as to cause a distribution under the said Chapter 128 Wis. Stats. of 1929 which is less favorable to general creditors of plaintiff's standing than the distribution provided for by the Federal Bankruptcy Act." (R. 7)

It can be said of the Wisconsin statute as was said by this Court of the Arkansas statute, that

> "Intolerable inconsistencies and confusion would result if that insolvency law be given effect while the National Act is in force."
>
> *International Shoe Company* v. *Pinkus,* 278 U. S. 261, 265.

The two laws differ in the order of priorities:

The order of payment under the National Bankruptcy Act and under the Wisconsin law is as follows:

NATIONAL ACT:

1. Cost of preserving estate.
2. Filing fees in involuntary cases and expenses of recovering property.
3. Cost of administration.
4. Expense of creditors in opposing compositions.
5. Wages.
6. Taxes due to the United States, state, county, district and municipality.
7. Other debts having priority by law.
8. General creditors.

STATE ACT:

1. Unpaid taxes.
2. Debts due United States.
3. Debts due the state.
4. Expense of the assignment and management of the trust.
5. Wages.
6. General creditors.

Differences in respect to payment of taxes:

The state act (Sec. 128.16), as construed by the State Court, requires the absolute payment in full of all taxes levied against the property assigned. The Bankruptcy Act (Sec. 64a) provides that no taxes shall be ordered paid, the amount of which exceed the value of the bankrupt's interest in the property taxed. This might make a vital difference to general creditors.

Differences in respect to payment of wage claims:

Under the state law wages earned within **six months** preceding the assignment are entitled to priority (Sec. 128.16). The Bankruptcy Act, Sec. 64 (b-5), provides for the payment of wages earned within the preceding **three months** only, and limits the amount of wages to $600 per claimant. The state act includes a wider class of employees entitled to wage priority than does the Bankruptcy Act, thus reducing the amount available for general creditors.

Differences in respect to payment of dividends:

The Bankrupcy Act provides for a payment of first dividends within thirty days after adjudication, while the state act permits no dividends to general creditors until after all priorities have been paid in full (Sec. 128.16). The state law provides that no creditor who has failed to file within three months shall participate in any dividend made before his claim is filed (Sec. 128.16). The Bankruptcy Act, Section 65 (c), provides that parties who file subsequent to the first dividend shall be paid a sufficient amount so that their total receipts will be on the same percentage as those of creditors who have theretofore been paid.

Differences in respect to speedy distribution:

It is conceded that one of the prime purposes of the Bankruptcy Act is to afford creditors prompt and speedy distribution.

> "It is obviously one of the purposes of the Bankrupt Law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The Act is filled with provisions for the quick and summary disposal of questions arising in the progress of the case without regard to usual modes of trial attended with some necessary delay."
>
> *Bailey* v. *Glover,* 21 Wallace 342, 346.

> "A proceeding in bankruptcy is intended to get the assets as speedily as possible into the hands of the creditors whose rights are first of all to be considered."
>
> *In re Soloway & Katz et al.,* 234 Fed. 67, 68-69 (C. C. A. 2d, Conn.).

The state law contemplates no such prompt and speedy action; and if it did, that purpose would be wholly circumvented by the terms of the Boyd assignment, authorizing indefinite continuance of business, and by the manner of administering the estate in the state court. This garnishment proceeding was instituted a little more than four months after the assignment was made, and up to that time there had been no pretense of paying any dividend to creditors. Under the Boyd assignment creditors have no assurance that the business will not be carried on several years longer.

Differences in respect to avoiding of preferences:

Under the state law, Section 128.02, preferences given within a **sixty-day** period may be avoided, while the Bankruptcy Law, Section 67 (c), makes voidable preferences made within **four months.**

The determination of what preferences shall be set aside and what claims shall be allowed, and the judicial machinery adopted for that purpose, are important factors in accomplishing the equal and equitable distribution of the debtor's property which is the main object of the National Act. Uniformity requires that the federal legislation shall control these matters.

> **"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."**
>
> *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 217.

Differences in respect to notices:

The bankruptcy law provides definitely for notice to creditors not only of the first meeting but of every other proceeding of any consequence (Chapter 6), while Chapter 128 seems to provide for only one notice to creditors (Sec. 128.14).

Differences in respect to selection of trustee:

Under the Bankruptcy Act the creditors are permitted to select their own trustee, while under Chapter 128 such selection is made by the debtor except that if the proceedings come under Chapter 334, Laws of 1897 (see p. 10 above), the selection is made by the court.

Differences in respect to examination of bankrupt:

Under the Bankruptcy Act, Section 55 (b), explicit provisior is made for the examination of the bankrupt by the creditors at the first meeting. No such provision is found in Chapter 128, and the jurisdiction of the court to order an examination of the assignor in an assignment proceedings is at present a debated question in Wisconsin.

Differences in respect to persons subject to involuntary proceedings:

For example, the Wisconsin Act, if operative, does not exclude farmers from its involuntary provisions. The Bankruptcy Act does. Was it the intention of Congress that states might set up laws which permitted throwing farmers into involuntary bankruptcy? This question was recently presented to the Supreme Court of Minnesota and was answered in the negative, that court saying:

> "We are convinced that, while the National Bankruptcy Act (11 USCA) is in force, chapter 90 of the General Statutes of 1913 is in abeyance and inoperative as to farmers, because it attempts to act within the field appropriated by congress under the National Bankruptcy Act. To hold otherwise would result in endless confusion and would circumvent the purposes of the act of congress which evidently intend to protect the farmer from involuntary bankruptcy proceedings. If we were to hold that chapter 90 might be invoked for the purpose of the distribution of assets alone, and that only the provision for release of debtors is to be inoperative during the time that the National Bankruptcy Act is in effect, the Insolvency Act could be used for the purpose of forcing farmers to take voluntary proceedings under the National Bankruptcy Act, thus accomplishing indirectly what congress evidently did not intend to permit."
>
> *Adrian State Bank* v. *Klinkhammer,* 182 Minn. 57.

It appears from the Revisor's note to the Wisconsin Statutes, that the Wisconsin involuntary bankruptcy system con-

tained in Chapter 334, Laws of 1897, was taken from Chapter 90 of the General Statutes of Minnesota. (Wisconsin Annotations of 1914, p. 568.)

There are other features in which the State and Federal law conflict, but the foregoing are sufficient to demonstrate that if the Wisconsin law is operative, then debtors (and creditors in involuntary proceedings) are given a choice in Wisconsin between two conflicting systems of administering bankrupt estates.

III.

IN ORDER TO INVALIDATE AN ASSIGNMENT MADE UNDER THE STATE LAW, IT IS NOT NECESSARY THAT BANKRUPTCY INTERVENE. A SINGLE CREDITOR WHO CANNOT INVOKE THE BANKRUPTCY ACT MAY DISREGARD THE ASSIGNMENT IN GARNISHMENT PROCEEDINGS.

The garnishee affidavit alleges, and it is admitted by the pleadings:

> "That diligent effort has been made to secure the joinder of a sufficient number of creditors of the said The Joseph M. Boyd Company with plaintiff in invoking the jurisdiction of the Federal Court of Bankruptcy, but plaintiff was unable to secure the joinder of other creditors to that end." (R. 7)

The allegations contained in the garnishee affidavit must be taken as evidencing a good faith effort on the part of appellant to invoke the provisions of the Bankruptcy Act. Having been unable to do so, she stands in exactly the same position as the plaintiff in the *Pinkus* case, and it should be held, as it was there held, that as to her the proceedings in the state court are void, regardless of the institution or non-institution of bankruptcy proceedings.

Prior to the decision in the *Pinkus* case it seems to have been considered in many quarters that state laws in conflict with bankruptcy laws were suspended only if bankruptcy proceedings were in fact instituted. The fallacy of this view was demonstrated in the *Pinkus* case, where that question was completely set at rest. Thus in *Hazelwood* v. *Olinger Building Department Stores,* 205 Wis. 85, the Supreme Court of Wisconsin, referring to the *Pinkus* case, said:

> "This case no doubt came as a surprise to a good many lawyers. While it had everywhere been freely conceded that the Bankruptcy Act was paramount to the insolvency laws of the state, it had been generally thought since the decision of *Boese* v. *King*, 108 U. S. 379, 2 Sup. Ct. 765, that a state assignee took title and might proceed until his authority was superseded by the invocation of the provisions of the federal Bankruptcy Act. It is held, however, in *International Shoe Co.* v. *Pinkus* that where the property is impounded under a state law which provides not only for its pro rata distribution among the creditors as far as it will go, but all claims filed are subject to be discharged upon the application of the bankrupt, the state law is entirely superseded and that an assignee under the state law taking under such a statute, takes no title as such." (p. 88)

We concede the correctness of the state court's view as to the general effect of the Bankruptcy Act upon state insolvency laws, but challenge the inference that this effect is limited only to state laws which contain discharge provisions.

IV.

CHAPTER 334, LAWS OF 1897, RELIED UPON BY THE STATE COURT TO DEFEAT APPELLANT'S RIGHT TO GARNISH, IS SUSPENDED AND WHOLLY VOID REGARDLESS OF THE VALIDITY OF OTHER PARTS OF CHAPTER 128, BECAUSE IT CONSTITUTES A COMPLETE SCHEME OF INVOLUNTARY BANKRUPTCY.

Appellant's claim up to this point has been that all of Chapter 128 is suspended, even though it be conceded that the discharge provisions which came into the law under Chapter 385, Laws of 1889, have been properly held to be separable and suspended by the earlier decisions of the Wisconsin Supreme Court.

We now direct our argument specifically against the validity of this particular assignment and particularly against the involuntary procedure set up by Chapter 334, Laws of 1897.

The assignment is void if considered solely as a common law assignment and without reference to any of the statutory provisions. It contains at least three vices designated by the court as badges of fraud (R. 32).

Not only is this assignment void as a common law assignment, but it is void under the express provisions of those portions of Chapter 128 which the Supreme Court of Wisconsin has held to be valid legislation merely regulatory of common law assignments (Sec. 128.06).

This is exactly the kind of a void assignment that was contemplated by Chapter 334, Laws of 1897 (see p. 10 above). The Boyd Company, by making this void assignment, brought itself automatically within the provisions of that chapter. As a penalty for an act which was in effect an act of bankruptcy, the entire estate of the insolvent Boyd Company was automatically thrown into the lap of the court to be admin-

istered by an assignee appointed by the court, without any reference whatsoever to the will or wishes of the assignor.

This provision in the state law, to all intents and purposes, is identical with the provisions in the bankruptcy law which make certain acts of the debtor the basis for an involuntary bankruptcy petition. From the very outset, therefore, the proceeding has been administered by the state court, not as a voluntary assignment, but as an involuntary statutory proceeding. The estate has been administered under a state law which, like the Bankruptcy Act:

(1) Sets up an involuntary proceeding which may be invoked against a debtor who commits acts which are in effect acts of bankruptcy.

(2) Provides for a statutory, not voluntary, distribution of assets under the direction of the court in accordance with the state statute.

(3) Establishes a state tribunal which passes upon claims and determines the validity of preferences.

(4) Provides for a distribution among general creditors, less favorable than distribution under the Bankruptcy Act.

(5) Embraces within its jurisdiction the same persons, subject matter, and rights as the National Bankruptcy Act.

(6) Authorizes a discharge to the debtor.

The Supreme Court of Wisconsin did not treat any of the parts of Chapter 334, Laws of 1897, as being severable, but held it to be valid in toto.

Chapter 334, Laws of 1897, after setting up this involuntary procedure, provided that:

> "The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor **for a discharge from his indebtedness** as if

any decided opinion upon this head; for the decision of the question is not required for the disposition of the case." (91 U. S. at 502.)

The effect of the bankruptcy law upon state insolvent laws was not involved because, as the court said:

> "The assignment in this case must, therefore, be regarded as though the Statute of Ohio, to which reference is made, had no existence." (91 U. S. at 502.)

The differences between the assignment in *Mayer* v. *Hellman* and that in the Boyd case are apparent. In the former case the assignment was valid as a common law assignment. In the present case the assignment is void as a common law assignment (see p. 17 above). In the former case the assignment was not in violation of any statutory provisions. In the present case the assignment is in violation of express statutory provisions (p. 12 above). In the former case the assignment was treated as a common law assignment and as if the state statutes were not in existence. If the Boyd assignment be so regarded, it is void. Such validity as there is to the title of the assignees in the present assignment is based entirely upon Chapter 334, Laws of 1897; hence there is squarely presented in the present case the question of the conflict between the state and the federal law, a question not involved in *Mayer* v. *Hellman*.

Boese v. King, 108 U. S. 379, considered.

Boese v. *King* does not support appellee's position. This court did not, in that case, sustain the validity of the New Jersey assignment law, but held rather that the New Jersey law was superseded. It was, however, held that judgment creditors who might have secured an equality of distribution by invoking the bankruptcy law could not sit by and thereafter invoke the aid of the court in securing preferences.

The inapplicability of *Boese* v. *King* to the present situation is apparent from the language of this court referring to that case in *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, at 267, where the court said:

> "The decision below is not supported by *Boese* v. *King, supra.* In that case there was an assignment under the New Jersey insolvency law. Some years later creditors obtained judgment against the assignor in New York. A receiver appointed in supplementary proceedings sued the assignees in New York to compel payment of the judgment out of funds they had on deposit there. The highest court of the State denied relief, and the case was brought here on writ of error. This Court held that the assignment was sufficient to pass title; and, **as the Bankruptcy Act had superseded the New Jersey insolvency law,** all the creditors were entitled unconditionally to share in pro rata distribution. The receiver was held not entitled to recover because the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but instead they waited until after the expiration of the time allowed for that purpose, and then by the New York suit sought to obtain preference and full payment. In the course of the opinion, it is said (p. 386): 'It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure.' The case now before us is essentially different. Plaintiff in error could not invoke jurisdiction of the bankruptcy court."

It is significant that this court, in its opinion in *Boese* v. *King,* expressly held that the assignees under the assignment there involved

> ". . . had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute." (108 U. S. at 386.)

This is a clear holding that the provisions of the state law relating to distribution are suspended.

Stellwagen v. Clum, 245 U. S. 605, considered.

The state court placed considerable reliance upon *Stellwagen* v. *Clum*, 245 U. S. 605, and it is therefore important to determine what was there actually held. In that case no attempt was being made, as is being made here, to administer an insolvent estate in the state court under the provisions of a state law. On the contrary, there had been an adjudication in bankruptcy and the trustee in bankruptcy was seeking to set aside a conveyance on the ground that it was fraudulent under the provisions of the state law although not a voidable preference under the provisions of the bankruptcy law. He was proceeding under Section 70 (e) of the Bankrupt Act, which provides:

> "The trustees may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the adjudication."

The court said:

> "This section as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law."

It was accordingly held that under the express provision of Section 70 (e) of the Bankruptcy Act the trustee might avoid any transfer which a creditor might have avoided and that it was the intent of Congress that he should have the benefit of state laws for the setting aside of fraudulent conveyances.

While the opinion does lay stress upon discharge as being a feature of the present bankruptcy law, the court nevertheless

expressly refrained from holding that only those state laws are suspended which contain discharge features. The court said:

> "And while it is not necessary to decide that there may not be state insolvent laws which are suspended although not providing for a discharge of indebtedness, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts." (245 U. S. at 616.)

To hold that a trustee in bankruptcy may, under the terms of the Bankruptcy Act, avail himself of provisions of a state law in setting aside fraudulent transfers certainly is not the equivalent of holding that proceedings may be had under the state law in the state court to administer insolvent estates.

If the case can conceivably be construed as holding that no state laws are suspended unless they contain a discharge provision, then we respectfully submit that such holding is not in accord with the fundamental nature and purpose of "the subject of bankruptcies" as that term is used in the Constitution. Nor is it in accord with the more recent holding in *International Shoe Co.* v. *Pinkus* to the effect that state laws governing

> ". . . the distribution of property of insolvents for the payment of their debts and providing for their discharge **or that otherwise relate to the subject of bankruptcies** are within the field entered by Congress when it passed the Bankruptcy Act and therefore such provisions must be held to have been superseded." (278 U. S. at 266.)

While the court in *Stellwagen* v. *Clum,* 245 U. S. 605, at p. 615, said:

> "It is only state laws which conflict with the bankruptcy laws of Congress that are suspended; and those which are in aid of the Bankruptcy Act can stand.";

in the later case (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265), the court said:

> "In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation."

In the light of the foregoing we submit that *Stellwagen* v. *Clum* must be confined to the question that was actually decided, namely, that the provisions of state laws relative to fraudulent conveyances may be utilized by a trustee in bankruptcy proceedings, because to that extent they are in aid of the bankruptcy administration, not in competition with it, and therefore no conflict can arise; but that any attempt to administer an insolvent estate in the state court would immediately create conflict with the National Act.

CONCLUSION

It is respectfully submitted that a consideration of the history of bankruptcy legislation and of its fundamental purposes, viewed in the light of the decisions of this Court, demonstrates that to the extent that the Wisconsin assignment law attempts to set up a system for the general statutory distribution of the assets of this or any other insolvent person or corporation, it invades the field occupied by Congress. It is in derogation of the uniformity prescribed by the Constitution. Indeed, it is in actual conflict with the Bankruptcy Act, and is therefore wholly suspended.

In addition thereto, it is respectfully submitted upon a narrower ground, that this particular assignment was from the very outset administered as an involuntary proceeding in the state court under the provisions of Chapter 334, Laws of 1897, which chapter contains every element of an involuntary bankruptcy law, including discharge, and that all of the

statutory provisions contained therein are suspended, and that therefore the appellant, under the express provisions of the Wisconsin garnishment law, is entitled to invoke her remedy of garnishment in this case.

The judgment of the Supreme Court of the State of Wisconsin should be reversed, with directions to affirm the judgment of the trial court.

Respectfully submitted,
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